

**STATE OF DELAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>RICHARD FLOWERS,</b>	:	
	:	
Appellant,	:	<b>PERB Review of Executive</b>
	:	<b>Director's Decision</b>
<b>v.</b>	:	<hr/>
	:	
<b>STATE OF DELAWARE, DELAWARE</b>	:	<b>ULP No. 17-01-1093</b>
<b>TRANSIT CORPORATION and AMALGAMATED</b>	:	
<b>TRANSIT UNION, LOCAL 842,</b>	:	
	:	
Appellees.	:	

**APPEARANCES**

Richard Flowers, *pro se*, Appellant  
Elizabeth Sloan, Esq., *Ballard Spahr LLP*, for Appellee DTC

The State of Delaware is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del. C. Chapter 13 (1986). The Delaware Transit Corporation (“DTC”) is an agency of the State.

The Amalgamated Transit Union (“ATU”) is an employee organization within the meaning of §1302(i) of the PERA. By and through its affiliated Local 842, the ATU is the exclusive bargaining representative of a unit of “all hourly-rated operating and maintenance employees” employed by DTC in New Castle County,” within the meaning of §1302(j) of the PERA.

Appellant Richard Flowers (“Flowers”) was employed by DTC as a Fixed Route Operator and was a public employee within the meaning of §1302(o). At all times relevant to this charge, Flowers was a member of the bargaining unit represented by the ATU Local 842 (“ATU”) and

DTC and ATU Local 842 were parties to a collective bargaining agreement which includes a negotiated grievance and arbitration procedure for the resolution of contractual disputes.

On January 10, 2017, Flowers filed an unfair labor practice alleging that DTC and ATU had each violated its statutory obligations when he was discharged on July 20, 2016. He alleged he was discharged for refusing to sign a medical records release form (required by DTC's third-party medical provider) as part of his return to work examination. Flowers asserts the form was "new, non-negotiated, all-encompassing and unlimited," and that it violated his federal rights under the Health Insurance Portability and Affordability Act (HIPAA). He also alleged he was singled out for discriminatory and retaliatory treatment by DTC. He asserted ATU Local 842 failed to meet its statutory obligations by failing to represent him and other bargaining unit members in pursuing challenges to the requirement that he sign the form attached to his charge as Exhibit 2 as well as a claim that he was deprived of a right contained in Section 21 of the parties' collective bargaining agreement.

On January 19, 2017, DTC filed its Answer denying the material allegations set forth in the Charge. Its Answer included New Matter, asserting the Charge failed to state a claim for which relief could be granted and that the Charge was untimely. Flowers filed his response to DTC's New Matter on February 1, 2017, in which he denied DTC's contentions.

On January 23, 2017, ATU filed its Answer denying the material allegations set forth in the Charge. Under New Matter, ATU asserted the Charge failed to state a claim for which relief could be granted and that the Charge is untimely. Flowers filed his response to ATU's New Matter on February 1, 2017, denying ATU's assertions.

An Order of Dismissal was issued on April 18, 2017, which found the Charge was untimely and failed to establish probable cause to believe that either DTC or ATU Local 842 engaged in conduct which constituted an unfair labor practice in violation of the PERA. The Charge was

dismissed in its entirety, with prejudice.

On April 24, 2017, Flowers requested review of the Executive Director's decision by the full Public Employment Relations Board. ATU Local 842 filed a written response to the request for review on May 5, 2017.

A copy of the record in this matter was provided to each member of the Public Employment Relations Board for review prior to hearing.<sup>1</sup> A public hearing was convened on May 17, 2017, at which time the full Board met in public session to hear and consider this request for review. The parties were provided the opportunity to present oral argument and the decision reached herein is based upon consideration of the record and the arguments presented to the Board.

### **DISCUSSION**

The Board's scope of review is limited to the record created by the parties and consideration of whether the decision is arbitrary, capricious, contrary to law, or unsupported by the record. After consideration of the record and the arguments of the parties on appeal, the Board must vote to either affirm, overturn, or remand the decision to the Executive Director for further action.

Preliminarily, this Request for Review is timely. The Executive Director's decision was issued on Tuesday, April 18, 2017. The Appellant filed this request for review on Monday, April 24, 2017. PERB Regulation 7.4 states,

The Executive Director's decision shall be subject to review by the Board at the request of any party or upon the Board's own motion. Such a request for review must be filed with the Board within five (5) days from the date upon which the party is served with the decision.

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<sup>1</sup> The Record transmitted to the Board did not include a set of audio recordings to which Flowers referred to in his Answer to New Matter II, but which were not referenced as an Exhibit to the Charge and accordingly were not part of the Record. The Executive Director did not consider the recordings in dismissing the Charge with prejudice.

PERB Regulation 1.1 states that if the last day of the filing period falls on either a Saturday, Sunday or legal holiday, the period shall run until the end of the next day which is not a Saturday, Sunday or legal holiday. By application of these regulations, this appeal is timely.

Flowers' arguments in support of his request for review relate directly to what he contends is a non-negotiated, universal release of medical records form which he was required to sign as a condition of returning to work. He asserts DTC discriminatorily applied the requirement in retaliation for his history of engaging in protected concerted activity, including filing and testifying in unfair labor practice proceedings. He also charges ATU Local 842 has acted collusively because it did not challenge the medical release as a material change in the return to work policy. The Appellant concludes that he was terminated exclusively because he did not sign the form to allow his physicians to release his medical records.

The Board carefully reviewed the record in this case and finds the Executive Director's determination that the Charge was both untimely and failed to establish probable cause to believe that either DTC or ATU Local 842 may have engaged in conduct which constituted an unfair labor practice as alleged is neither arbitrary nor capricious, and is supported by relevant law. The Appellant's contention that an unfair labor practice charge cannot be filed until discipline has been implemented is legally unsupportable. He acknowledges in his written argument that he is aware of unfair labor practice charges that have been deferred by this Board to the grievance and arbitration procedure but misses the point that those deferred charges were filed within the 180 day statute of limitations in order to preserve the right of the charging party to pursue its statutory claim(s) should the arbitration procedure not resolve it.

The Appellant argues the Executive Director erred in dismissing the Charge because it was not filed within 180 days. Title 19 Del.C. §1308(a) states "...no complaint shall issue based on any unfair labor practice occurring more than 180 days prior to the filing of the charge with the

Board.” The statute of limitations limits PERB’s jurisdiction in unfair labor practice proceedings. The Appellant argues that the statute of limitations was not triggered until he was terminated on July 26, 2016. He concedes, however, that he was aware on or about January 20, 2016 that DTC’s medical provider required him to provide a release of medical records from his treating physician(s) so that information could be reviewed as part of the return to work physical examination. The filing period begins to run at the time the complained of conduct occurred. *Victoria Henry v. DTC*, ULP 05-01-462, V PERB 3217, 3220 (2006). In this case, the charge was not filed until January 10, 2017, nearly a year after the Appellant acknowledges he was made aware that his Return to Work physical examination could not be completed unless and until he signed a release to allow his treating physicians to release medical information to DTC’s medical provider.

Finally, the Appellant argued DTC violated the negotiated collective bargaining agreement when it allowed its medical provider to require him to sign a medical records release as part of the return to work examination. The statutory unfair labor practice forum is not a substitute for the negotiated grievance procedure. *Brandywine Affiliate v. Brandywine Bd. of Education*, ULP 85-06-005, I PERB 131, 142 (1986). The Appellant’s window to file a grievance alleging a violation of the collective bargaining agreement was five days from the date he knew of the alleged contractual violation, which was in January, 2016.


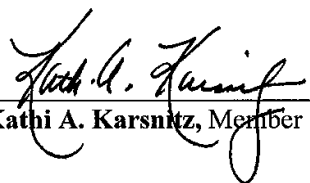
### **DECISION**

After reviewing the record, hearing and considering the arguments of the parties, the Board unanimously affirms the decision of the Executive Director dismissing the Charge because it is untimely and fails to establish probable cause to believe that either the Delaware Transit

Corporation or the Amalgamated Transit Union, Local 842 committed an unfair labor practice, as alleged by the Appellant.

Wherefore, the appeal of the dismissal of the Charge is denied.

**IT IS SO ORDERED.**

  
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**Elizabeth D. Maron, Chairperson**  
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**R. Robert Currie, Jr., Member**  
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**Kathi A. Karsnitz, Member**

DATED: June 6, 2017